NO. 78-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

JAMES EUGENE FLOYD, JR.,
Appellant

v.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT

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April, 1979

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CITATIONS

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JURISDICTIONAL STATEMENT

James Eugene Floyd, Jr., appellant, appeals from final judgments of the Texas Court of Criminal Appeals, dated November 8, 1978, holding that § 43.04 of the Texas Penal Code is not unconstitutionally indefinite, uncertain, vague and overbroad, and does not violate the due process clause of the Constitution of the United States.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, which appears in the appendix hereto, is reported at 575 S.W.2d 21 (Tex. Crim. App. 1978).

JURISDICTION

The judgments of the Texas Court of Criminal Appeals affirming the convictions were entered on September 20, 1978. The state court denied a motion for rehearing on November 8, 1978.

On February 6, 1979, Mr. Justice Lewis F. Powell, Jr., extended the time for docketing this appeal to April 6, 1979. This appeal is being docketed as of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether Section 43.04 of the Texas Penal Code is unconstitutionally indefinite, uncertain, vague and overbroad, in violation of the due process clause of the Constitution of the United States.

CONSTITUTIONAL PROVISION AND STATUTE

U.S. CONST. amend. V, which provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law;

TEX. PENAL CODE ANN. § 43.04(a) (1974):

A person commits an offense if he knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes.

STATEMENT OF THE CASE

This appeal is from two state court convictions for aggravated promotion of prostitution. Each indictment alleged, in pertinent part, that appellant "did then and

there unlawfully and knowingly own, invest in, finance, control, supervise and manage a prostitution enterprise that used two or more prostitutes. . . ." Appellant waived trial by jury and entered pleas of guilty to both indictments. Punishment was assessed by the court in each case at confinement in the penitentiary for a period of six years.

Appellant appealed the convictions to the Texas Court of Criminal Appeals, and the sole ground raised on appeal was his challenge to the constitutionality of the statute. The Texas Court of Criminal Appeals upheld the statute and affirmed the convictions.

RAISING THE FEDERAL QUESTION

Appellant did not challenge the constitutionality of the aggravated promotion of prostitution statute in the trial court. Appellant raised the issue for the first time on his direct appeal to the Texas Court of Criminal Appeals. Appellant urged that the Texas statutory scheme purporting to prohibit this offense was unconstitutional because the applicable statutes were indefinite, uncertain, vague and overbroad, in violation of the due process clause of the Constitutions of the United States and State of Texas. The Texas Court of Criminal Appeals considered and expressly rejected this federal constitutional claim. *Floyd v. State*, 575 S.W.2d 21 (Tex. Crim. App. 1978).

THE QUESTION IS SUBSTANTIAL

The question as to the due process implications of depriving a citizen of liberty for engaging in conduct that arguably falls within the ambit of § 43.04 of the Texas Penal Code is a substantial one that has never before been

treated by this Court. Numerous states have statutes that are similar to the Texas statute, so this question is not limited solely to Texas. Appellant submits that the question is sufficiently substantial as to require plenary consideration, including briefs on the merits and oral argument, for proper resolution.

A. The Texas statute is indefinite, uncertain and vague

It is well established that every penal statute must be sufficiently definite, clear and unambiguous so that those citizens subject to its provisions will know with reasonable certainty what conduct it prohibits, and who is liable to punishment for its infraction. It must not be so indefinitely framed or of such doubtful construction that it cannot be understood. Thus, a statute is unconstitutionally vague when it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally v. General Construction Co.*, 269 U.S. 385 (1926). The vagueness doctrine prohibts holding a person criminally responsible for conduct which he could not reasonably understand to be proscribed, and requires reasonably clear guidelines to prevent arbitrary and discriminatory enforcement and to proscribe a precise standard for the adjudication of guilt. Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 76 (1960).

Section 43.04 of the Texas Penal Code provides that, "A person commits an offense if he knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes." The Texas statutes do not define the term "prostitution

enterprise", but the Texas Court of Criminal Appeals has defined same as "the plan or design for a venture or undertaking in which two or more persons offer to, agree to, or engage in sexual conduct in return for a fee payable to them." *Taylor v. State*, 548 S.W.2d 723 (Tex. Crim. App. 1977). Appellant submits that this judicially created definition for the term "prostitution enterprise" fails to provide an ascertainable standard of guilt to comport with the requirements of due process of law.

The Texas Penal Code does not require that a "prostitution enterprise" be located in a house, building, or tangible structure of any kind. Apparently, it can be an intangible concept. Thus, should a person knowingly own, invest in or finance a business wherein acts of prostitution happen to occur, the Texas statute can transform that legitimate business into a "prostitution enterprise" without an ascertainable standard for determining how that is done. This construction of the statute, which the Court of Criminal Appeals adopted, improperly requires citizens, at peril of life, liberty or property to speculate as to the meaning of the statute. This is clearly impermissible. Cf. *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961).

Furthermore, § 43.04 is vague in that is does not define the term "use." The statute does not require that the "prostitution enterprise" "use" two or more prostitutes for any particular purpose; specifically, it does not require that they be "used" for the purpose of prostitution. The statute on its face criminalizes an enterprise which "uses" so-called "prostitutes" solely to cook meals, sweep the floors, wait on tables, dance for or simply converse with customers. This would improperly penalize persons on the basis of a status. Thus, the Texas statute

fails to provide adequate notice of the conduct sought to be prohibited because it fails to proscribe the manner in which it is unlawful to "use" prostitutes in a given enterprise.

B. The Texas statute is overbroad

A statute is void for overbreadth when a reasonable application of its sanctions could include conduct protected by the Constitution. This occurs when the statute prohibits both activity protected by the Constitution as well as activity not so protected. *Thornhill v. Alabama,* 310 U.S. 88 (1940). It is impermissible for the legislature to "set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who could be set at large." *United States v. Reese,* 92 U.S. 214 (1876).

Appellant submits that § 43.04 fails to except from its reach conduct which is seemingly proper and legitimate, and this renders the statute unconstitutionally overbroad. The Texas statute does not require, even by inference, that the person charged with aggravated promotion of prostitution receive any profit from his connection with the activity or have any profit motive. Consequently, certain conduct which ought to be protected will fall within the purview of § 43.04.

A person who owns an apartment complex and knows that some of the tenants were engaging in sexual conduct in return for money or other things of value, within the confines of their individual apartments, has committed the offense of aggravated promotion of prostitution under § 43.04, even though he did not receive any of the proceeds gained by the tenants. The apartment manager and

persons who invested in the apartments would likewise be guilty if they knew of the conduct of the tenants. This hypothetical situation, carried to its logical extreme, would lead to the anomolous result that the same persons would be guilty of no offense if the tenants received no fee for engaging in sexual conduct, but simply did it for free.

The Texas statute would also encompass the conduct of a man who supports and finances two mistresses whom he knows to engage in prostitution in his absence. Because the man provides the funds to enable the women to have a place to entertain others in acts of prostitution, and because he knows that they receive funds for same, it appears that the man has, perhaps unwittingly, financed a "prostitution enterprise" under § 43.04.

The aforementioned examples all assume that profit is not an essential element of the offense of aggravated promotion of prostitution. However, even if a profit motive were an essential element, the statute would still be unconstitutionally overbroad. Many medical practitioners, psychiatrists and psychologists have become involved in sexual dysfunction clinics in cities across the United States. These clinics provide sexual therapy for persons who experience problems in their sexual relations. The therapy may, on occasion, include the act of sexual intercourse or sexual conduct between the patient and a "sex surrogate", a paid partner furnished by the clinic. The patient generally is charged a pre-arranged fee by the clinic, which in turn compensates the surrogate. These clinics were created primarily as a result of the research of Dr. William Masters and Dr. Virginia Johnson, who are recognized as pioneers in the field of sexual dysfunction.

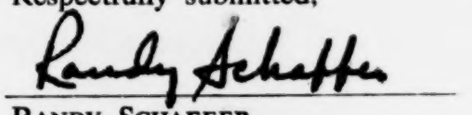
It is clear that a person who opened a sexual dysfunction clinic in Texas could be prosecuted for aggravated promotion of prostitution. Because the sex surrogates engage in sexual conduct for a fee, the far-reaching tenacles of TEX. PENAL CODE ANN. § 43.02 (a) (1) (1974), which has no exceptions, would categorize them as prostitutes. The medical practitioner who knowingly owns the clinic, controls and supervises the activities of the surrogates, and additionally receives a profit therefrom, clearly falls within the ambit of § 43.04. Thus, this statute is so broad that it encompasses conduct such as sexual therapy directed by qualified therapists, which logically ought to be protected.

Appellant submits that the citizens of the State of Texas do not have a precise standard to determine what conduct is made unlawful by § 43.04 of the Penal Code. The term "prostitution enterprise" is ambiguous by its very nature. It is so vague, indefinite and uncertain that legitimate conduct could easily fall within its proscription. Cf. *State v. Lopez*, 98 Idaho 581, 570 P.2d 259 (1976). The statute fails to proscribe the manner or purpose for which it is unlawful to "use" a prostitute. The statute does not require that the defendant have a profit motive or some illicit purpose in mind. Finally, there are no exclusions made available to cover medical therapy, such as that provided by sexual dysfunction clinics, nor to cover the hypothetical situations presented above. Consequently, appellant's convictions are void under the due process clause of the United States Constitution.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



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Counsel for Appellant
James Eugene Floyd, Jr.

April 6, 1979

APPENDIX A

JAMES EUGENE FLOYD, JR.,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

NOS. 57623, 57624.

Court of Criminal Appeals of Texas,
Panel No. 3.

September 20, 1978.

Appellants' Motion for Rehearing En Banc
Denied November 8, 1978.

OPINION

ROBERTS, Judge.

These are appeals from two convictions for aggravated promotion of prostitution. Appellant waived trial by jury and entered pleas of guilty to both indictments. Punishment was assessed by the court in each case at six years' confinement in the penitentiary.

[1] In his sole ground of error, appellant challenges the constitutionality of V.T.C.A., Penal Code, Sections 43.02(a)(1) (Prostitution) and 43.04 (Aggravated Promotion of Prostitution)[1] on the grounds that they are "unconstitutionally indefinite, uncertain, vague and overbroad, in violation of the due process clause of the Con-

1. Unless otherwise indicated, all statutory references are to Texas Penal Code.

stitutions of the United States and the State of Texas."[2] We affirm.

Section 43.04 provides:

> "Aggravated Promotion of Prostitution
>
> "(a) A person commits an offense if he knowingly owns, invests in, finances, controls, supervises, or manages a *prostitution enterprise* that *uses* two or more prostitutes.
>
> "(b) An offense under this section is a felony of the third degree." (Emphasis supplied).

Appellant urges that Section 43.04 is unconstitutionally vague because the term "prostitution enterprise," as used in the statute, is capable of various meanings. He further urges that the statute is rendered unduly confusing and ambiguous by its use of the term "uses."

[2, 3] It is true that a law must be sufficiently definite that its terms and provisions may be known, understood and applied; otherwise, it is void and unenforceable. *Ex part Granviel*, 561 S.W.2d 503, 511 (Tex. Cr. App. 1978). However, a statute is not rendered unconstitutionally vague merely because the words or terms are not specially defined. *Powell v. State*, 538 S.W.2d 617, 619 (Tex. Cr. App. 1976).

2. We note that the thrust of appellant's constitutional attack is aimed at Section 43.04 and that his challenge to Section 43.02 (a)(1) is by necessary implication alone. V.T.C.A., Penal Code, Sections 43.01 and 43.02(a)(1) define "prostitution" as offering to, agreeing to, or engaging in sexual conduct in return for a fee payable to the actor. See also *Taylor v. State*, 548 S.W.2d 723 (Tex. Cr. App. 1977). We hold that this statutory definition, when measured by common understanding and practices, fairly apprise appellant of the nature of the conduct it proscribes. *Farmer v. State*, 540 S.W.2d 721, 722 (Tex. Cr. App. 1976). Hence, appellant's constitutional challenge to Section 43.02(a)(1) must fail and our further consideration of his ground of error will be limited to his challenge to Section 43.04.

[4, 5] A statute which is arguably vague may be given constitutional clarity when aided by the standard rules of statutory construction. One such rule is that terms not defined in a statute are to be given their plain and ordinary meaning. *Courtemanche v. State*, 507 S.W.2d 545, 546 (Tex. Cr. App. 1974). Moreover, words defined in dictionaries and with meanings so well known as to be understood by a person of ordinary intelligence are not to be considered vague and indefinite. *Powell v. State*, supra at 619.

[6] In *Taylor v. State*, 548 S.W.2d 723 (Tex. Cr. App. 1977), we applied the foregoing rules of construction to Section 43.04 and defined "prostitution enterprise" as "a plan or design for a venture or undertaking in which two or more persons offer to, agree to, or engage in sexual conduct in return for a fee payable to them." Id. at 723. Accordingly, we hold that the term "prostitution enterprise" is not vague, indefinite or ambiguous.

[7] Nor is the word "uses," as it is found in the context of Section 43.04, confusing and ambiguous. Under Section 43.04 a prostitution enterprise must "use" two or more prostitutes. Appellant contends that this word creates ambiguity and confusion because the Legislature failed to specify the particular purpose for which two or more prostitutes must be used. This contention is without merit. Regardless of legislative syntax, the word "uses," as it is found in the context of Section 43.04, is capable of only one meaning. Both common logic and the rules of grammar dictate that a prostitution enterprise that uses prostitutes necessarily uses them for prostitution.

[8] We hold that the terms complained of by appellant do not render Section 43.04 so ambiguous and vague

that men of ordinary intelligence would guess at its meaning or differ as to its application. We further hold that appellant had sufficient notice of the type of conduct proscribed by the statute and therefore he was not deprived of procedural due process. See *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439, 458 (1974).

[9] Appellant also contends that Section 43.04 suffers from the constitutional infirmity of "overbreadth" because it fails to except from its reach "conduct which is perfectly proper and legitimate." In support of this contention, appellant advances several hypothetical situations in which he argues that the actor's conduct, while technically falling within the reach of Section 43.04, should not be penalized because there is no illicit motive involved.

An intriguing hypothetical presented by appellant involves a situation where a man supports and finances two mistresses whom he knows to engage in prostitution in his absence. Under a literal application of Section 43.04, appellant argues, the hypothetical man would be guilty of aggravated promotion of prostitution. We cannot agree.

[10] The plain and ordinary meaning of the term "prostitution enterprise," as it is used in Section 43.04, is synonymous with the term "prostitution business." The term "prostitution enterprise" includes the concept of a willingness or desire on the part of the entrepreneur to promote and further the venture or undertaking and bring it to a successful conclusion. Thus, where it is the actor's immediate objective to promote prostitution as a particular field of endeavor, his conduct is punishable under Section 43.04. In the hypothetical situations presented by appellant, the actor, although he had passive knowledge of the surrounding circumstances, was not engaged

in a "prostitution enterprise" as that term is commonly understood and accepted because there was no immediate objective to promote prostitution as a particular field of endeavor. Passive knowledge of surrounding circumstances alone does not constitute an enterprise or business.

Appellant advances another ingenious hypothetical in which he discusses so-called sexual dysfunction clinics, apparently a recent phenomenon in this country.

As we have been informed by appellant, these clinics provide sexual therapy for persons who experience problems in their sexual relations. The therapy provided by the clinic may, on some occasions, include the act of sexual intercourse between the patient and "sex surrogate," a paid partner furnished by the clinic. The patient is charged a pre-arranged fee by the clinic who in turn compensates the surrogate. Appellant argues that those who operate a sexual dysfunction clinic in Texas could be prosecuted for aggravated promotion of prostitution if the therapy provided involves sexual conduct defined in V.T.C.A., Penal Code, Section 43.01(4).

We decline to pass upon the legality vel non of such an enterprise under our present Penal Code. We note, however, that if the Legislature intended medical therapy to be an affirmative defense in offenses of this nature, it would have so provided. Accordingly, we hold that appellant's hypothetical concerning sexual dysfunction clinics should properly be addressed by the Legislature as a matter which is wholly within their province.

We have thoroughly considered appellant's contentions and find them to be without merit. Accordingly, appellant's ground of error is overruled.

The judgments are affirmed.

APPENDIX B

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 57,623 styled:

JAMES EUGENE FLOYD, JR.,
Appellant

v.

THE STATE OF TEXAS,
Appellee

the judgment of the 204th Judicial District Court of Dallas County, Texas was affirmed on September 20, 1978, on November 8, 1978 the appellant's motion for rehearing en banc was denied and on January 17, 1979, the mandate of this Court issued.

THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR REHEARING EN BANC this cause was disposed of by this Court on January 17, 1979, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas this the 29th day of March, A. D. 1979.

(S E A L)

/s/ THOMAS LOWE
Thomas Lowe, Clerk of the Court
of Criminal Appeals of Texas

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 57,624 styled:

JAMES EUGENE FLOYD, JR.,
Appellant

v.

THE STATE OF TEXAS,
Appellee

the judgment of the 204th Judicial District Court of Dallas County, Texas was affirmed on September 20, 1978, on November 8, 1978 the appellant's motion for rehearing en banc was denied and on January 17, 1979 the mandate of this Court issued.

THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR REHEARING EN BANC this cause was disposed of by this Court on January 17, 1979, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas this the 29th day of March, A. D. 1979.

(S E A L)

/s/ THOMAS LOWE
Thomas Lowe, Clerk of the Court
of Criminal Appeals of Texas

APPENDIX C

SUPREME COURT OF THE UNITED STATES

NO. A-704

JAMES EUGENE FLOYD, JR.,
Appellant

v.

TEXAS

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including April 6, 1979.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 6th
day of February, 1979.